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In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 240

H. T. ARNOLD,

Petitioner,

v.

PANHANDLE & SANTA FE RAILWAY CO.,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas and the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo

BRIEF FOR THE PETITIONER

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JURISDICTION

The final judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo was rendered and entered on October 10, 1955 (R. 359). The order denying petitioner's Motion for Rehearing by said Court of Civil Appeals was rendered and entered on November 7, 1955 (R. 364).

The order of the Supreme Court of Texas refusing Petitioner's Application for Writ of Error was rendered and entered on March 14, 1956 (R. 392). The order denying Petitioner's Motion for a Rehearing of his Application for Writ of Error by the Texas Supreme Court was rendered and entered on April 1, 1956 (R. 397).

The jurisdiction of this Court rests in *28 U. S. C., Section 1257(3).*

QUESTIONS PRESENTED

Question 1.

Whether the failure of a railway company to furnish its injured employee a reasonably safe place in which to work is a proper jury question upon which a judgment can be entered in an action brought in a State Court under the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.*

Question 2.

Whether a state appellate court in an action brought under the *Federal Employer's Liability Act, 45 U. S. C.,*

Section 51, et seq., may invade the province of the jury and disregard the jury's findings, which are supported by the evidence, that a railway company negligently failed to furnish its injured employee a reasonably safe place to work, proximately causing his injuries, and may consider only the jury's answers to issues which negative negligence of the railway company in some other respects and convict the employee of contributory negligence.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

1.

The constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2.

The statutory provision involved in this case is that portion of the Federal Employer's Liability Act which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person

suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth, shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce, and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908 c. 149, Sec. 1, 35 Stat. 65, Aug. 11, 1939, c., 685, Sec. 1, 53, Stat. 1404. 45 U. S. Code, Sec. 51."

STATEMENT

1. Pleadings.

Petitioner instituted this suit in the District Court of Lubbock County, Texas, 99th Judicial District, under the Federal Employer's Liability Act against the Panhandle & Santa Fe Railway Co. to recover damages for injuries sustained by him in the due course and scope of his employment for the railway company (R. 1).

By way of cross-action Respondent brought R. A. Billings, d/b/a Billings Freight & Baggage Transfer, into the lawsuit as a third party defendant (R. 7-9).

Petitioner went to trial on his first amended original petition (R. 17). In this petition Petitioner alleged that Respondent was guilty of negligence proximately causing Petitioner's injuries (a) in failing to furnish Petitioner a reasonably safe place to work; (b) in failing to warn plaintiff of the truck in the immediate vicinity of where he was working; (c) in failing to maintain a flag man or person to protect Petitioner while performing his duties for the railroad; (d) in failing to furnish and maintain a blue flag for Petitioner; (e) in permitting the truck to be operated in a careless and negligent manner in the vicinity where Petitioner was working; (f) in allowing the truck to be driven on an area normally used as a walkway; and, (g) in failing to keep a proper lookout for Petitioner. Petitioner also alleged that defendant, R. A. Billings, was negligent in certain respects (R. 20-21).

Respondent in its first amended answer (R. 10) and defendant, Billings, in his first amended original answer (R. 12), each denied negligence on their respective parts, and each alleged that Petitioner's own negligence proximately caused his injuries, and Respondent further alleged that Petitioner's own negligence was the sole proximate cause of his injuries (R. 11).

2. Evidence.

(a) *Testimony of Petitioner.*

Petitioner testified that he was a car inspector for Respondent at the time he was injured (R. 26). At the time Petitioner was injured there were three baggage cars on

a spur track which Petitioner was inspecting and on which he was working (R. 29). On the west side of the spur track was a graveled surface which was hard, smooth, and level (R. 29). This graveled surface was ten feet eight inches in width (R. 29). The cars were designated as Nos. 1, 2, and 3 from north to south, and Cars 1 and 2 were connected, but Car 3 was not connected to Car 2 (R. 29).

When Petitioner first came around these three cars he entered the northeast door of Car 1 and saw that mail was being unloaded into Billings' truck from Car No. 1 (R. 30), which truck was backed up at an angle to the west door at the north end of Car No. 1 (R. 31), thereby causing the front of the truck to be headed in a generally northwesterly direction. The truck was filled with mail to the extent that the rear window of the truck was covered (R. 32).

Petitioner then passed on into Car No. 2, and came out of the south door on the west side of Car No. 2 (R. 30). At that time he again saw the Billings' truck backed up to Car No. 1 (R. 30). Then Petitioner walked down to about the center of Car No. 3 and closed a valve and then walked back toward Car No. 2 (R. 32) at which time the truck was still backed up at an angle to the car (R. 33). Petitioner then opened a valve by the door of Car No. 3 which took approximately two seconds (R. 33). He then walked away to the south approximately 27 feet when he was struck in the back by the righthand corner of the end gate of the truck. At the time Petitioner was

hit he was approximately two feet from the side of Car No. 3 (R. 38). The driver of the truck was backing up blind and could not see Petitioner going alongside of Car No. 3 (R. 38), and no warning was given that the truck was backing (R. 39).

The truck which hit Petitioner was eight feet and a few inches wide (R. 36), and Petitioner knew that the truck sometimes went out forward and sometimes went out backwards (R. 37, 64). A driver would have to be pretty good even to stay on the road (R. 71).

On cross-examination Petitioner identified certain of Respondent's exhibits. With the first being a picture of the driveway, the old depot, and some railway cars on the tracks in question (Defendant's Exhibit 1; R. 55, 288 A). Defendant's Exhibit 2 was identified as being a picture of the Billings' truck with the truck being backed up at the approximate angle as it was prior to the time Petitioner was hit by it (Defendant's Exhibit 2; R. 56, 288 A). Defendant's Exhibit 3 was identified as being a truck on the driveway correctly portraying the scene of the accident (Defendant's Exhibit 3; R. 56, 288 B). Defendant's Exhibit 4 was identified as being a picture of the driveway looking to the south on the west side of the tracks (Defendant's Exhibit 4, R. 57, 288B).

Petitioner had told Respondent's agent in charge of the station area, Mr. H. C. Pumphrey, that it was dangerous the way that the trucks backed up in that area, and Mr. Pumphrey agreed with Petitioner that it was dangerous,

but the trucks kept coming up and picking up mail in that manner (R. 42, 286).

(b) *Testimony of Witnesses for Respondent.*

H. C. Pumphrey was the local agent for Respondent. Up to about 1948 and 1949 the graveled area in question had been a narrow walkway when passengers used the area (R. 145). After that the area was widened and graveled to be used by mail trucks in loading and unloading mail from the baggage car that sits on the spur (R. 146).

Mr. Pumphrey further testified that the Billings' truck which hit Petitioner had been instructed by Respondent to use the driveway in question (R. 157); that he had instructed Billings that the trucks were absolutely supposed to come and go from the south (R. 158); that it was not permissible for the Billings' trucks to drive around in front of the station (R. 155); that the driveway was one way and that if the trucks head in that they would have to back out (R. 147, 151).

Mr. Pumphrey further stated that when the truck was backing out there would only be about one and a half feet clearance on each side of the truck (R. 149); that he would not expect a truck and a man to occupy the walkway at the same time (R. 149); that either the man or the truck would have to get off (R. 150); that "it would be dangerous for anybody to step out from behind the truck" (R. 152); but that he did not consider the suitation dangerous (R. 153).

(c) *Testimony of Witnesses for R. A. Billings.*

Mr. Billings himself testified that Respondent had given him specific instructions not to proceed to the north after having entered from the south (R. 235). He was instructed to use this passageway and no other, it having been built by Respondent for his use (R. 243). The driveway was approximately eleven feet wide (R. 235), and if it was a hazard Respondent had made it so (R. 243). The truck which struck Petitioner was ninety-two inches wide (R. 243), and when proceeding down the driveway in question there was a one-foot clearance on each side of the truck (R. 244). As long as a man was even with the side of the truck he would be visible by the side mirrors on the truck, but if he were further towards the left wheel from the side of the truck, he would not be visible (R. 244). A man cannot stand between the edge of the car and the truck without being hit which did not sound very safe (R. 245). If the driveway had been wider it would have possibly been a safer proposition (R. 245). There was not sufficient room to pull the truck forward and turn around before coming out of the driveway (R. 246).

Joe T. Stone was hauling mail in the truck which hit Petitioner as Billings' employee (R. 267). The driveway used by the truck was one way and they were not permitted to go out to the north (R. 268). The driveway was "an awful tight place" (R. 271).

3. Findings of Jury and Judgment of Trial Court.

Based upon the pleadings and the evidence, the trial court submitted by its charge to the jury (R. 308) certain special issues and in answer to those concerning the negligence of the railway company, the jury found that the railway company negligently failed to furnish plaintiff a reasonably safe place in which to do his work, proximately causing his injuries (R. 310). However, the jury found that the railway company was not negligent in permitting the truck to use the passageway (R. 312), in failing to warn plaintiff of the truck as it approached him (R. 311), or in keeping a proper lookout for plaintiff (R. 313). The jury further found that plaintiff failed to keep a proper lookout for his own safety, proximately causing his injuries (R. 319), but not being the sole proximate cause (R. 320). The jury further exonerated Defendant Billings of negligence (R. 313-319). The jury then assessed Petitioner's damages at $30,000.00, which sum was reduced on a comparative negligence basis to the sum of $18,000.00 (R. 321).

Under the pleadings, evidence and verdict of the jury, the trial court rendered judgment for Petitioner against Respondent for the sum of $18,000.00, with interest thereon at the rate of 6% per annum until paid and further ordered that the Railroad Retirement Board of the United States first have and recover from Respondent out of the $18,000.00 damages awarded its lien and subrogation in the amount of $1,302.00. The trial court further ordered

that neither Petitioner nor Respondent should recover anything from defendant, R. A. Billings (R. 326).

4. Action Taken by State Appellate Courts.

From the judgment of the trial court awarding Petitioner damages from Respondent, Respondent duly perfected its appeal to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo. In reversing the trial court judgment for Petitioner and rendering judgment for Respondent (R. 359), the Court of Civil Appeals held in part as follows:

> "The testimony of Appellee renders indisputable the fact that the sole proximate cause of his injury, insofar as might be chargeable to Appellant, and not to Appellee's own contributory negligence, was the truck of Billings located on the graveled passageway. Since the jury found, under Special Issues Nos. 7 and 8 outlined under No. 2 hereinabove, that the Appellant railway company was not negligent on the occasion in question in permitting motor trucks on an area used by Plaintiff Arnold in the performance of his work, Appellant was entitled to judgment in the trial court on such verdict. If Appellee was not furnished a safe place to work by Appellant, it was solely by reason of the fact that the truck of Billings was permitted in the area. If the railroad was not negligent in permitting the motor truck in the area, then it necessarily follows that it did not fail to furnish Appellee a reasonably safe place in which to do his work. In any event, under the jury findings, no negligence could attach to Appellant by reason of the truck being in the area, and the alleged consequent failure of Appellant to furnish Appellee a safe place to work. Without negligence on the part of Appellant, it could not be liable to Appellee. Benson v. Mo. K. & T. R.

Co., 200 S. W. 2d 233, Writ Ref.; International-Great Northern R. Co. v. Lowry, 121 S. W. 2d 585 (Sup. Ct., Texas). Further strengthening this proposition are other jury issues in the cause. The jury found that a proximate cause of Appellee's injury was his own failure to keep a proper lookout. In the total absence of negligence and causation attributable to either the Appellant railway company or to Billings' truck driver, Appellee's failure to keep a proper lookout necessarily becomes the sole proximate cause of his injuries, and he cannot recover as against the Appellant railway.

"* * * The ruling in the case (Harbin, et al. v. City of Beaumont, 146 S. W. 2d 297) wholly sustains the opinion hereinabove on the sound principle that where a jury has acquitted Appellant of all specific acts of negligence, a finding of the jury that the Appellant was guilty of negligence in not furnishing Appellee a reasonably safe place in which to work is nothing more than the jury's conclusion of law which has no support in the facts found, and, therefore, cannot support a judgment. * * *

"* * * A general finding that Appellant failed to furnish Appellee with a safe place to work cannot stand in the face of the specific findings of the jury exonerating both Appellant railway and Billings of any negligence proximately causing Appellee's injuries. * * *." (R. 357-358.)

Petitioner duly filed his Motion for Rehearing with the Court of Civil Appeals (R. 360), which motion was overruled (R. 364). Following this Petitioner filed his Application for Writ of Error with the Supreme Court of Texas (R. 365), which Application was refused by the Supreme Court of Texas (R. 392). Petitioner then filed his Motion for Rehearing of the Application for Writ of

Error (R. 393), which Motion was overruled by the Supreme Court of Texas (R. 397).

SUMMARY OF ARGUMENT

Petitioner instituted this suit under the Federal Employer's Liability Act to recover for injuries suffered by him while in the course and scope of his employment for Respondent. The questions presented in this case are simple ones and similiar questions have consistently been resolved by this Honorable Court in favor of similarly situated Petitioners.

With reference to Respondent's duty to furnish Petitioner a reasonably safe place to work, the evidence showed that Petitioner was struck by a truck which was backing up (R. 34) on a ten foot eight inch gravel driveway running adjacent to Respondent's railroad tracks on which were situated three railway cars (R. 29). The driver was backing blind and could not see Petitioner going alongside the last of the cars (R. 38), and the driver of the truck was forced to back out under specific instructions from one of Respondent's agents (R. 147). It was Petitioner's duty to inspect these cars (R. 29). There was evidence to the effect that Respondent had knowledge of the dangerous condition existing by reason of the narrowness of the driveway and the backing of the trucks (R. 42, 286), although this knowledge was denied by one of Respondent's employees (R. 153).

Based upon this and other evidence set forth above in the Statement, the jury found in response to special issues

submitted to them that Respondent failed to furnish Petitioner a reasonably safe place to work, which was negligence, proximately causing Petitioner's injuries (R. 310).

In addition, the jury found that Respondent was not negligent in failing to warn Petitioner of the approach of the truck (R. 311), in permitting the truck to be driven on the area (R. 312), nor in failing to keep a proper lookout for Petitioner (R. 313).

In addition, the jury found that Petitioner failed to keep a proper lookout, proximately causing his injuries.

The trial court in its judgment found that the jurys' answers to these issues established liability on the part of Respondent.

The Amarillo Court of Civil Appeals reversed the judgment of the trial court and rendered judgment for Respondent holding that the jury's finding that Respondent failed to furnish Petitioner a reasonably safe place to work was a conclusion of law without factual support, and further that such finding was destroyed by the other issues negativing negligence on the part of Respondent. The Amarillo Court therefore concluded that there was no basis in the facts found to support a judgment (R. 358). The Amarillo Court further found that as a matter of law Petitioner's contributory negligence was the sole proximate cause of his injuries (R. 358).

These holdings by the Amarillo Court were clearly in violation of the humanitarian and liberal intent of Con-

gress as evidenced by the Federal Employer's Liability Act. This intent of Congress has been successfully protected on many occasions by this Honorable Court.

It has often been held in this connection that one of the primary issues in a case brought under the Act is whether or not the employer furnished the employee with a reasonably safe place to work. That the safe place to work issue is an ultimate issue and one upon which judgment can be entered, is a proposition that is well supported by the opinions of the United States Supreme Court. *Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 Sup. Ct. 1062.*

The Act itself imposes liability upon the employer for injuries suffered by an employee resulting "in whole or in part" from a "defect or insufficiency," due to the employer's negligence, in the places or equipment furnished the employee to work which is just another way of saying that the employer will be liable if he fails to furnish the employee a safe place to work.

Thus, since the unsafe place to work issue is an ultimate issue which was clearly supported by the evidence, the trial court properly entered judgment for Petitioner. *Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 Sup. Ct. 444.*

Therefore, when the Amarillo Court found that the jury's finding that Respondent failed to furnish Petitioner a reasonably safe place to work would not support a judgment, that Court was invading the province of the jury, thereby depriving Petitioner of his right to trial by jury

submitted to the jury for their determination in determining the liability of the employer. In the instant case the Amarillo Court of Civil Appeals held that "a finding of the jury that the Appellant was guilty of negligence in not furnishing Appellee a reasonably safe place in which to work is nothing more than the jury's conclusion of law which has no support in the facts found, and therefore, cannot support a judgment" (R. 358). This holding that a jury finding that employer failed to furnish its employee with a safe place to work is only the jury's conclusion of law certainly does not conform with the cases decided under the Federal Employer's Liability Act, and is not in accord with the holdings of this Honorable Court.

This can be readily seen by an examination of this Court's opinion in *Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 Sup. Ct. 1062.* On Pages 352 and 353 of its opinion the Court held as follows:

> "Section 1 of the Act makes the carrier liable for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' * * * The rights which the Act creates are Federal rights protected by Federal law rather than local rules of law. * * * And those Federal rules have been largely fashioned from the common law except as Congress has written into the Act different standards. * * * At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. * * * That rule is deeply engrained in Federal jurisprudence. * * * It is that rule which obtains under the Employer's Liability Act."

Further discussing the "unsafe place to work" issue this Honorable Court stated in its opinion in the *Bailey* case that:

> "The debatable quality of that issue, the fact that fair men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury."

Another example of the safety of the place furnished an injured employee in which to do his work as being determinative of the liability of his employer is exhibited by the case of *Lavender v. Kurn, 327 U. S. 645, 66 Sup. Ct. 740*, in which the United States Supreme Court rendered judgment for the injured employee where the conditions were such that it was not unreasonable to conclude that an unsafe and dangerous working place existed and that the conditions contributed, in part, to the switch tender's death.

In the case of *Griswold v. Gardener, 155 Fed. 2d 333 (146)*, the Court of Appeals for the Seventh Circuit held that what constitutes a reasonable safe place to work, negligence and proximate cause are jury questions under the Federal Employer's Liability Act. Certiorari was denied in this case at *329 U. S. 725, 67 Sup. Ct. 74.*

Even in cases arising and being tried in some of the State Courts in Texas the issue of whether or not the employer furnished the employee with a reasonably safe place to work has been considered to be an ultimate issue upon which judgment has been entered. However, it is so well established that this is an ultimate issue that the submission of it to the jury has not been questioned. A

case in which such an issue was made a basis for judgment in Texas, but was not in issue on appeal, is *T. & P. Ry. Co. v. Riley*, in which certiorari was denied, *325 U. S. 873, 65 Sup. Ct. 1414 (Texas case 183 S. W. 2d 991).*

The Federal Employer's Liability Act itself states that every railroad employer shall be liable in damages for injury resulting in whole or in part "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment." This is certainly tantamount to saying that such railroad employer would be liable in damages for injury resulting from its failing to furnish its employees with a safe place to work, and this has been the interpretation of this Court and many lower courts, both Federal and State. In the instant case, the place furnished by Respondent to Petitioner for Petitioner's work was Respondent's roadbed and its tracks and cars. Certainly asking the jury whether or not Respondent failed to furnish Petitioner a reasonably safe place to work is the same thing as asking the jury to determine whether or not there was a defect or insufficiency in the cars, track, or roadbed upon which Petitioner, by the very nature of his work for Respondent, was required to work. Therefore, it is without question that the Act itself makes the issue of whether or not a reasonably safe place to work was furnished an injured employee an ultimate fact issue to be determined by the jury and submission of issues in substantially the words of a statute has always been approved by the courts.

For the purposes of argument only, Petitioner might concede that the Amarillo Court of Civil Appeals would have correctly held the issue regarding safe place to work as being a conclusion had the case been an ordinary damage suit tried under the laws of the State of Texas. However, this was not the case, and yet, the Amarillo Court in its unrelenting obedience to the peculiar local special issue practice prevalent in Texas felt compelled to apply the meticulous rules prevalent in such special issue practice to conclude that the issue concerning the safety of the place furnished Petitioner in which to do his work was not an ultimate fact issue in the case. This is precisely the practice which has on many occasions been condemned by this Honorable Court. In regard to such practices, Mr. Justice Holmes stated in the case of *Davis v. Wechsler, 263 U. S. 22, 24, 44 Sup. Ct. 13, 14*, that:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

This principle was also stated as hereinbefore quoted in *Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 352.*

The principle has also been recognized by Texas Appellate Courts. For example, in the case of *T. & P. Ry. Co. v. Younger, 262 S. W. 2d 557, 560, Ft. Worth (Error Ref., N. R. E.)*, which was instituted under the Federal Employer's Liability Act, it was held that under the Act "no substantive right of any party may be impaired by any local statute, rule of practice, or forms of local practice."

Petitioner, by selecting a State tribunal, did not by that act amend or modify his substantive rights under the Federal Act. Had he selected a Federal tribunal, a charge on unsafe place would certainly have been proper as has been held on many occasions. There is no question but that what constitutes a proper issue in a Federal Employer's Liability Act case is not a matter of procedure but a matter of substantive rights to be liberally construed, not varying in the Courts with different conceptions under State laws and rules. Since Federal substantive rights must be uniformly applied in State and Federal Courts alike and cannot be defeated by the forms of local practice, uniform interpretation of the Federal Employer's Liability Act and substantive rights thereunder dictate that Petitioner was entitled to have his case submitted to the jury on the ultimate issue of the safety of the place furnished by his employer in which to do his work. Therefore, the finding of the jury in the instant case that Respondent failed to furnish a reasonably safe place in which to work was not merely a conclusion, but was an ultimate fact issue properly submitted to the jury and upon which a judgment could be entered.

POINT TWO

The evidence was more than sufficient to support the jury's finding that Respondent failed to furnish Petitioner a reasonably safe place to work.

The Amarillo Court of Civil Appeals held that the "finding of the jury that the Appellant was guilty of negligence

in not furnishing Appellee a reasonably safe place in which to work is nothing more than the jury's conclusion of law which has no support in the facts found" (R. 358). Petitioner assumes that the Court meant that this finding was not supported by the jury's further findings that Respondent was not negligent in failing to warn Petitioner of the approach of the truck (R. 311); that Respondent was not negligent in permitting motor trucks to be driven on the area used by Petitioner (R. 312); and that Respondent did not fail to keep a proper lookout for Petitioner. As will be hereinafter more fully discussed and pointed out under Point Three, these latter three sets of issues have no connection with the issue concerning unsafe place, and certainly have little if any bearing on the jury's answer to the issue concerning safe place and the evidence in support of such finding.

If Petitioner has correctly interpreted the Amarillo Court's reasoning on this matter, then Petitioner sees little justification for such statement having been made in the opinion. Petitioner was not seeking support of his contention that Respondent failed to furnish him a safe place to work on the facts found in response to the other issues which were found favorable to Respondent in connection with negligence of itself and its employees.

However, if the Court meant to say that the jury's finding that Respondent failed to furnish Petitioner a safe place to work was not supported by the facts, meaning the evidence, then certainly the Amarillo Court was in

error. Petitioner was not seeking support to that issue from facts found in response to other issues, for the safe place issue was separate and distinct from such other issues and was based on other evidence.

The evidence in support of the jury's finding that Respondent failed to furnish Petitioner a safe place to work is fully set forth in the Statement herein. For the sake of brevity, Petitioner will not again set forth all the evidence in support of the jury's finding on the safe place issue, but Petitioner does respectfully again point out certain salient points of evidence in this regard.

Petitioner was struck by a truck owned by one Billings (R. 34) on a ten foot eight inch graveled passageway which was smooth and level (R. 29) and was constructed by the railway company (R. 146). The truck was between ninety-two inches (R. 243) and something more than eight feet wide (R. 36). Trains or cars were placed on the track adjoining the passageway by Respondent for inspection by Petitioner (R. 29), at the same time the Billings' truck was unloading mail from the mail car on the train (R. 30). Respondent directed the truck to use the passageway which was one way (R. 146), had clearance on each side of the truck of only one to one and a half feet (R. 149, 244) and had no room in which to turn around (R. 246). The truck when picking up the mail was not permitted to go out forward around in front of the station after picking up the mail, but if it drove in forward as it did, it had to back out as it did (R. 147, 158). The passageway was too

narrow to be occupied by the mail truck and Petitioner at the same time (R. 150). That all was under the railway company's direction, control, and on its premises (R. 146, 147). The railway company had knowledge of the dangerous condition created by virtue of such combination of circumstances (R. 42, 286), although this knowledge was denied by Mr. Pumphrey (R. 153). Mr. Billings also testified that there was not room for a man to stand between the edge of one of the railway cars and his truck; that this condition sounded not very safe; and that a wider driveway would have possibly made it safer (R. 245). Billings' driver, Joe Stone, described the situation presented as being "awful tight place" (R. 271).

Without unduly burdening this Honorable Court with lengthy argument, it appears obvious that the testimony above referred to, coupled with that additional testimony set forth in the statement herein clearly shows that the jury had ample support in the evidence in its finding that Respondent failed to furnish Petitioner with a reasonably safe place to work. This is true without having to take advantage of the apparent holdings that the jury's power to draw inferences in this type of action is greater than in common law actions. *Jesionowski v. B. & M. R. Co., 329 U. S. 452, 67 Sup. Ct. 401; Lillie v. Thompson, 332 U. S. 459, 68 Sup. Ct. 140; Affolder v. N. Y. C. & St. L. R. Co., 339 U. S. 96, 70 Sup. Ct. 509; Smalls v. Atlantic Coast Line R. Co., 348 U. S. 946, 75 Sup. Ct. 439; Ruddy v. N. Y. Central R. Co., 224 Fed. 2d 96.*

When fair-minded men can draw different conclusions from the evidence, the case is not one of law but one of fact to be settled by the jury. *Myers v. Reading Co., 331 U. S. 477, 67 Sup. Ct. 1334.* It is the intent of the Congress that to the maximum extent proper, questions in actions arising under the Federal Employer's Liability Act should be left to the jury. *Tiller v. Atl. Coast Line R. Co., 318 U. S. 54, 63 Sup. Ct. 444.* Such cases may not be taken from the jury merely because the question of liability is close or doubtful, *Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 Sup. Ct. 1062.*

> "It is not the function of the Court to search the record for conflicting circumstantial evidence in order to take the case away from a jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29.*

In any case in which fair-minded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute, by choosing what seems to them to be the most reasonable inference. It is not material that an Appellate Court may draw a contrary inference or feel that another conclusion is more reasonable. *Lavender v. Kurn, 327 U. S. 645, 66 Sup. Ct. 740.*

In view of the evidence presented and the law in point it appears that without question that the jury's finding that Respondent failed to furnish Petitioner a safe place to work is supported by the evidence without reference to

other facts found by the jury in answer to other issues submitted to them.

POINT THREE

Holding that the jury's finding that Respondent failed to furnish Petitioner a reasonably safe place to work would not support a judgment for Petitioner deprives Petitioner of his constitutional right to trial by jury.

As hereinbefore demonstrated, the trial court properly submitted to the jury an issue inquiring as to whether Respondent failed to furnish Petitioner a reasonably safe place in which to work since such issue is unquestionably a proper ultimate issue in a case tried under the Federal Employer's Liability Act. It has also been shown that the jury's finding that Respondent failed to furnish Petitioner a reasonably safe place to work was more than supported by the evidence.

Therefore, *the holdings of the Amarillo Court of Civil Appeals* being (a) that the jury's findings that Respondent failed to furnish Petitioner a reasonably safe place in which to do his work constituted a conclusion of law having no factual support and was destroyed by the findings acquitting Respondent of specific acts of negligence (R. 358), and (b) that the Plaintiff's failure to keep a proper lookout for his own safety constituted the sole proximate cause of his injuries (R. 358), where the jury had found that such failure was not the sole proximate cause (R. 336), *clearly constitute invasions of the jury's province*

and deprive Petitioner of his constitutional right of trial by jury.

When an injured railway employee has been deprived of his constitutional right of trial by jury, this Honorable Court has on many occasions jealously restored this right. *Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 Sup. Ct. 444; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29; Lavender v. Kurn, 327 U. S. 645, 66 Sup. Ct. 740; Schulz v. Pennsylvania R. Co., 350 U. S. 523, 76 Sup. Ct. 608,* to mention but a few.

The court in *Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 Sup. Ct. 1062,* at Page 353 of its opinion stated this fundamental principle as follows:

> "The right to trial by jury is a basic and fundamental feature of our system of Federal jurisprudence. It is part and parcel of the remedy afforded railroad workers under the Employer's Liability Act. Reasonable care in cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The holding of the Court of Civil Appeals that as a matter of law the failure of Petitioner to keep a proper lookout for his own safety constituted the sole proximate cause of his injuries (R. 358) was made directly in the face of the evidence which Petitioner respectfully contends conclusively showed that his injuries were *proximately caused*

by the failure of Respondent to furnish Petitioner a reasonably safe place to work, and the jury so found. Therefore, failing to keep a proper lookout for his own safety could not constitute the sole proximate cause of plaintiff's injuries since there cannot be a sole proximate cause finding where another finding of proximate cause exists.

The Federal Employer's Liability Act requires only that the jury find that the injuries were caused "in part," by the employer. The jury went even further and found that Petitioner's injuries were *proximately* caused by Respondent's negligence. Therefore, the Court was not justified in disregarding the jurys' finding.

The elements found by the jury in favor of Respondent that it was not negligent in permitting the truck to use the passageway (R. 328) nor in failing to warn Petitioner of the approach of the truck (R. 327), and that Respondent did not fail to keep a proper lookout for Petitioner certainly do not destroy findings of unsafe place as they were held to do by the Amarillo Court of Civil Appeals (R. 358). In the first place, the issues found in Respondent's favor were those submitted to a jury on the basis set forth in the Federal Employer's Liability Act that the employer shall be liable for the negligence of any of its officers, agents or employees. The issue regarding the safety of the place furnished Petitioner in which to do his work concerned that portion of the Act creating liability on the part of the employer where such injury resulted in whole or in part by reason of a defect or insufficiency in

Respondent's places of work or equipment. Thus, there are two separate and distinct bases of recovery set forth in the Act, and each of these bases was submitted to the jury in these respective issues, and the finding against Petitioner on the negligence of Respondent's officers, agents and employees does not destroy the safe place finding in favor of Petitioner based upon "defect or insufficiency."

Another strong reason that the issues of liability found in Respondent's favor do not destroy the safe place finding against Respondent is that the findings in Respondent's favor were based on only three evidentiary elements, whereas, there were many other evidentiary elements and an abundance of evidence in support thereof to the effect that the railway company had created a dangerously narrow passage way resulting in an unsafe place to work. The evidence in support of this unsafe place has been fully discussed in the Statement herein and in the foregoing Point, and for this reason, Petitioner will not repeat this testimony at this point. However, taken as a whole (as in *Blair v. B. & O. Ry. 323 U. S. 600, 65 Sup. Ct. 1528)* where the several elements are so closely interwoven as to form a single pattern and where one element imparts character to the other, clearly the jury had a right and obviously did take into consideration the overall scope of construction, maintenance, control and instructed use by the railway of its premises, the nature of the tasks in-

volved, the hazards entailed, such as footing, clearance or lack of space on the one-way passageway, in determining that the railway company had failed to furnish Petitioner a reasonably safe place in which to perform his work.

As a matter of logic, the jury's findings that Petitioner was not negligent in certain respects did not conflict with their finding that Respondent failed to furnish Petitioner a reasonably safe place to work. Unquestionably, the jury gave this matter its very considered and careful thought and attention in determining that a preponderance of the evidence showed that Respondent did fail to furnish Petitioner a safe place to work, but that it did not show that Respondent was negligent in the other respects. To now say that the jury's favorable finding on safe place was destroyed by the unfavorable findings on specific negligence is to completely abrogate Petitioner's right of trial by jury.

As stated by the Court in *Urie v. Thompson, 337 U. S. 163, 69 Sup. Ct. 1018*, on Page 174 of the opinion "what constitutes negligence for the Statutes' purposes is a Federal question, not varying in accordance with the differing conceptions of negligence applicable under State and local laws for other purposes. Federal decisional law formulating and applying the concept governs."

Also applicable to the opinion of the Court of Civil Appeals is that portion of the opinion of the Supreme Court

of the United States of *Tennant v. Peoria P. & U. Ry. Co., 321 U. S. 29, 35,* as follows:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instruction, and draws the ultimate conclusion as to the fact. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because Judges feel that other results are more reasonable."

Petitioner again states that this is a prime example where in "Federal Employer's Liability Act cases that an indifferent or unfriendly attitude had permeated with a philosophy hostile to that reflected in the legislation" (Mr. Justice Douglas, *Stare Decisis, 49 Col. L. Rev., 735, 752).* In giving vent to this attitude the Amarillo Court of Civil Appeals improperly invaded the province of the jury by substitution of its own conclusions for that of the jury thereby denying Petitioner his constitutional right of trial by jury.

CONCLUSION

Petitioner respectfully submits that the judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo be reversed and the judgment of the trial court affirmed.

Respectfully submitted,

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By .....